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Overtime Security for the 21st Century Workforce

Safeguards for Workers

- The final rule increases the minimum salary level required for exemption to \$455 per week (\$23,660 annually) – an historic \$300 per week increase over the existing regulations.
- New section 541.3(a) provides that “blue collar” workers are entitled to overtime pay.
- New section 541.3(b) provides that police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees are entitled to overtime pay.
- New section 541.4 states that neither the FLSA nor the final rule relieves employers from their contractual obligations under collective bargaining agreements.
- The “highly compensated” test in the final rule applies only to employees who earn at least \$100,000 per year *and* who “customarily and regularly” perform exempt duties.
- The final rule deletes the special rules for exemption applicable to “sole charge” executives, strengthening protections for workers under the executive duties test.
- The final rule adds the requirement that employees who own at least a *bona fide* 20 percent equity interest in a business are exempt *only* if they are “actively engaged in its management.”
- The final rule maintains the previous requirement that exempt administrative employees must exercise discretion and independent judgment.
- Final section 541.301(e)(2) states that licensed practical nurses and other similar health care employees are entitled to overtime. The final rule retains previous law regarding the overtime rights of registered nurses.
- The final rule clarifies the Department’s intent not to change the educational requirements for the professional exemption, and defines “work requiring advanced knowledge” as “work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.”
- The final rule retains terms used in the previous regulations, but makes them easier to understand and apply to the 21st Century workplace by better reflecting existing federal case law. In addition, the overall length of the regulations has been reduced from 31,000 words to just 15,000.

To learn more about the U.S. Department of Labor’s Final Regulations
on the FLSA “White Collar” Exemptions visit www.dol.gov/fairpay



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Strengthening Overtime

- The Bush Administration's final rule will guarantee overtime protections to 6.7 million workers earning \$23,660 per year or less by nearly tripling the minimum salary level.
 - With the enhanced overtime protections in the final rule, 1.3 million salaried "white collar" workers, who were not entitled to overtime pay under the previous regulations, will gain up to \$375 million in additional earnings every year.
 - Another 5.4 million salaried workers, who under the previous regulations were unsure if they should be paid overtime, get an ironclad guarantee of overtime rights under the final rule — regardless of their job duties.
- The final rule strengthens overtime protections for licensed practical nurses and first responders, such as police officers, fire fighters, paramedics, and emergency medical technicians, by clearly stating for the first time that these workers are entitled to overtime.
- The final rule retains terms used in the previous regulations, but makes them easier to understand and apply to the 21st Century workplace by better reflect existing federal case law. In addition, the overall length of the regulations has been reduced from 31,000 words to just 15,000.

Protecting Overtime Can't Wait on Politics or Costly Litigation

- Under previous law, only workers earning less than \$8,060 were guaranteed overtime pay because the minimum salary level had not been updated for nearly 30 years.
- The descriptions of job duties required for the overtime exemption had been frozen in time for nearly 50 years, resulting in confusion and uncertainty for both workers and employers.
- The previous regulations were outdated, confusing and complex, and have led to an explosion of lawsuits. Federal court class actions for FLSA cases have tripled since 1997, and now outnumber discrimination class actions.
- Low-wage and middle-income workers should not have to wait another 50 years for rules that protect their overtime pay, and should not have to spend years in federal court to receive their fair pay. Action is needed now to ensure workers receive their overtime pay in real time.
- The final rule ensures that employees can understand their rights to overtime pay; employers can readily determine their legal obligations and comply with the law; and the Department of Labor can more vigorously enforce the law.

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Concerns Raised in Public Comments:

The \$22,100 annual (\$425/week) minimum salary level for exemption is too low.

Middle-income workers will be harmed because workers earning more than \$65,000 per year might not be entitled to overtime pay.

Too many workers would be denied overtime protections.

“Blue collar” workers will lose their right to overtime.

Police, fire fighters, paramedics, emergency medical technicians (EMTs) and other first responders will lose their right to overtime.

Nurses will lose their right to overtime.

Veterans will lose their right to overtime.

Technicians, cooks and other skilled employees who do not have four-year college degrees will lose their right to overtime.

Every worker who holds a “position of responsibility” or has a “high level of skill or training” will lose their right to overtime.

Low-level employees who do not have discretion in their jobs will qualify for exemption and lose their right to overtime.

Change in the Final Regulation:

- ➔ The final rule requires a minimum salary level of \$23,660 (\$455/week) – a \$300/week increase over the current minimum of \$8,060 (\$155/week).
- ➔ To be considered exempt from overtime, “highly compensated” employees in the final rule must earn at least \$100,000 per year, *and* “customarily and regularly” perform exempt duties.
- ➔ The new highly compensated test for employees who earn \$100,000 per year *and* perform exempt duties *could* affect up to 107,000 higher-income workers. However, 6.7 million workers earning less than \$23,660 will have their overtime protections guaranteed. For workers in the middle, the final rule is more protective, or at least as protective, of their overtime rights than the old rule.
- ➔ New § 541.3(a) clearly states that “blue collar” workers are entitled to overtime pay.
- ➔ New § 541.3(b) states that first responders such as police, fire fighters, paramedics and EMTs are entitled to overtime pay.
- ➔ The final § 541.301(e)(2) states that licensed practical nurses and other similar health care employees do not qualify as exempt professionals. The final rule retains the previous law regarding registered nurses.
- ➔ The reference to “training in the armed forces” has been removed from final § 541.301(d) to clarify that veteran status does not affect overtime pay.
- ➔ The final rule clarifies that there is no change to the educational requirements for the professional exemption. These workers will keep their existing overtime protections.
- ➔ The “position of responsibility” and “high level of skill or training” proposed language has been removed from the administrative duties test.
- ➔ The final rule retains the discretion standards from the previous administrative and professional duties test.

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Overtime Litigation is a Growing Burden on Workers and the Economy

Summary: Trial lawyers have been taking advantage of outdated and confusing white-collar overtime regulations to bring wasteful class action lawsuits that cost the economy millions of dollars and require workers to wait years to be paid the overtime they deserve. By updating and clarifying the white-collar overtime provisions of the Fair Labor Standards Act (FLSA), the Department of Labor seeks to reduce this needless burden on workers and the economy.

Overtime litigation is among the fastest growing areas of employment litigation today.

- ✓ Overall, federal FLSA cases have grown from approximately 1,500 per year in the 1990s to approximately 3,000 per year by 2003, and FLSA class actions have more than tripled since 1997.
- ✓ Since 2001, federal class action lawsuits under the FLSA have outnumbered employment discrimination class actions.

The confusing nature of the previous overtime regulations created today's litigation burden.

- ✓ Because of the lack of clarity in the previous rules, it was very difficult to determine whether or not employees had a right to overtime.
- ✓ Different courts in different parts of the country have contributed to the confusion by providing conflicting guidance on seemingly similar occupations. For example,
 - A court in Oregon found that "log merchandise buyers" were not entitled to overtime, while a court in Louisiana found that "purchasing agents" were entitled to overtime.
 - A court in Virginia found that a designer of electrical equipment was entitled to overtime, while a court in New York said a designer of electrical systems was not entitled to overtime.
 - A court in New York found that assistant managers were not entitled to overtime, while a court in Illinois found it questionable whether store managers were entitled to overtime.

While trial lawyers benefit from overtime litigation, the burden grows on workers and the economy.

- ✓ When overtime litigation goes to court, workers typically have to wait approximately two years to get paid.
- ✓ Overtime class action lawsuits are increasingly acknowledged as a bonanza for trial lawyers and a danger to businesses of all sizes.
 - According to the *Texas Lawyer*, overtime litigation is "attractive" to trial lawyers because of the "astonishingly high...amount of money at stake."

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- A recent *Lawyers Weekly USA* headline shows how lucrative this area has become for trial lawyers by noting the, “Boom in Overtime Suits: A Danger for Employers But ‘Gold Mine’ for Plaintiff’s Lawyers.”
- According to *Lawyers Weekly USA*, trial lawyers have characterized overtime lawsuits as a “sleeping giant,” that defendants are typically willing to “roll over and pay,” and that taking advantage of employers does not require “an extensive background in the FLSA to be successful.”
- According to the *Texas Lawyer*, “medium-sized and smaller companies are just as susceptible - and often even more vulnerable to the high cost of [overtime] litigation.”

The explosion in overtime litigation is taking place at the state level as well.

- ✓ Overtime class actions at the state level have recently increased into the tens of millions of dollars. For example,
 - In 2002, Pacific Bell paid \$35 million for allegedly misclassifying employees as exempt professionals.
 - In 2002, Starbucks paid \$18 million to settle lawsuits alleging that managers and assistant managers were misclassified as exempt from overtime.
 - In 2004, a \$90 million liability was finalized against Farmers Insurance due to misclassification of claims adjusters, with no finding of malicious conduct or intentional wrongdoing.
- ✓ In many cases, trial lawyers are getting paid significant sums in state courts that could be going to workers or into job creation.
 - In a set of recent cases involving Taco Bell, Oregon workers each received approximately \$1,300 while the trial lawyers received \$1.5 million and California workers each received approximately \$2,800, while the trial lawyers received close to \$4 million.
 - In a 2001 case involving Coca-Cola bottlers, each worker received approximately \$12,000 while the trial lawyers received close to \$7 million.

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Side-by-Side Comparisons Of the Current, Proposed and Final Regulations

Minimum Salary Level for Exemption		
Current Regulation	Proposed Regulation	Final Regulation
\$155 per week \$8,060 annual	\$425 per week \$22,100 annual	\$455 per week \$23,660 annual

Summary of Salary Levels and Duties Tests			
Annual Earnings	Current Regulation	Proposed Regulation	Final Regulation
Less than \$8,060	Guaranteed Overtime	Guaranteed Overtime	Guaranteed Overtime
\$8,060 to \$13,000	Long Duties Test	Guaranteed Overtime	Guaranteed Overtime
\$13,000 to \$22,100	Short Duties Test for Higher Salaried Employees	Guaranteed Overtime	Guaranteed Overtime
\$22,100 to \$23,660	Short Duties Test for Higher Salaried Employees	Proposed Standard Duties Test	Guaranteed Overtime
\$23,660 to \$65,000	Short Duties Test for Higher Salaried Employees	Proposed Standard Duties Test	Standard Duties Test
\$65,000 to \$100,000	Short Duties Test for Higher Salaried Employees	Proposed Highly Compensated Test	Standard Duties Test
\$100,000 or more	Short Duties Test for Higher Salaried Employees	Proposed Highly Compensated Test	Highly Compensated Test

Executive Employees Duties Test		
Current Regulation (Short Test)	Proposed Regulation	Final Regulation
<p>Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and</p> <p>Who customarily and regularly directs the work of two or more other employees.</p>	<p>With a primary duty of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</p> <p>Who customarily and regularly directs the work of two or more other employees; and</p> <p>Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight.</p>	<p>Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</p> <p>Who customarily and regularly directs the work of two or more other employees; and</p> <p>Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.</p>

Administrative Employees Duties Test		
Current Regulation (Short Test)	Proposed Regulation	Final Regulation
<p>Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and</p> <p>Which includes work requiring the exercise of discretion and independent judgment.</p>	<p>With a primary duty of the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers; and</p> <p>Who holds a position of responsibility with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.</p>	<p>Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and</p> <p>Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</p>

Professional Employees Duties Test		
Current Regulation (Short Test)	Proposed Regulation	Final Regulation
<p>Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and</p> <p>Which includes work requiring the consistent exercise of discretion and judgment; <i>or</i></p> <p>Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</p>	<p>With a primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience; <i>or</i></p> <p>With a primary duty of performing office or non-manual work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</p>	<p>Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; <i>or</i></p> <p>Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</p>

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